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Soo Teck Lee & Ors v Lim Geok Kim

B HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO WA-22NCVC-134–03 OF 2019
WONG CHEE LIN J
4 SEPTEMBER 2020

C *Legal Profession — Disqualification — Conflict of interest — Defendants applied for disqualification of legal firm acting on behalf of plaintiffs — Fourth plaintiff and a witness were partners of a legal firm acting on behalf of plaintiffs — Whether there was conflict of interest*

D The plaintiffs had filed an action against defendants for breach of sale and purchase agreements ('the SPAs') by the defendants. The defendants on the other hand argued that the SPAs were sham agreements and sought for all the agreements to be declared null and void. The defendants alleged that the sham agreements were drafted and prepared based on the instructions of the fourth
E plaintiff who was also the main partner of the legal firm of Lee & Lim which acted on behalf of the plaintiffs in the present case. The defendants then applied for the disqualification of the legal firm of Lee & Lim from acting on behalf of the plaintiffs ('the application') on the basis that the fourth plaintiffs had pecuniary interest in the action and was a partner of the said legal firm.
F Furthermore, another partner of Lee & Lim, Hasniza purported to have witnessed the execution of the SPAs. The plaintiffs submitted that another legal assistant Tang Keen Cheong was handling the case and not the fourth plaintiff or Hasniza, as such, the legal firm of Lee & Lim could continue to act for the plaintiffs.

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Held, allowing the application:

(1) The plaintiffs' submission that since the fourth plaintiff and Hasniza, who were material witnesses would not be conducting the trial, the firm
H of Lee & Lim could still act was without merit. Only a firm could be retained as solicitors on record and not a particular lawyer. Further, the proximity and relationship of partners and legal assistants in the same firm was too close for comfort to ensure that a conflict of interest would not arise (see paras 14–15).

I (2) In all the cases wherein, certain lawyers were witnesses or were otherwise disqualified from acting, the whole firm had been disqualified from acting. The Bar Council Rulings 6.04 which were relied upon by the plaintiffs did not have the force of law and could not override statutory provisions and case authorities which clearly stated that where certain

members of a firm were witnesses or had pecuniary interest in the subject matter of the claim, the firm should not act. Based on the above findings, the court was of the view that it would be in the interest of justice for the legal firm of Lee & Lim to be disqualified from acting for the plaintiffs as the fourth plaintiff and Hasniza will be witnesses in the trial and they were also the only partners in the said legal firm. In addition, the fourth plaintiff had a pecuniary interest in the action (see paras 16–18).

[Bahasa Malaysia summary

Plaintif-plaintif telah memfailkan tuntutan terhadap defendan-defendan di atas pelanggaran perjanjian jual beli ('perjanjian tersebut') oleh defendan-defendan. Defendan-defendan sebaliknya berpendapat bahawa perjanjian tersebut adalah perjanjian palsu dan memohon agar semua perjanjian tersebut diisytiharkan terbatal dan tidak sah. Defendan-defendan mendakwa bahawa perjanjian palsu tersebut dideraf dan disediakan berdasarkan arahan plaintif keempat yang juga rakan kongsi utama firma guaman Lee & Lim yang bertindak bagi pihak plaintif-plaintif dalam kes ini. Defendan-defenden kemudian memohon pembatalan kelayakan firma guaman Lee & Lim daripada bertindak bagi pihak plaintif-plaintif ('permohonan tersebut') atas alasan bahawa plaintif keempat mempunyai kepentingan dalam tindakan tersebut dan merupakan rakan kongsi firma guaman tersebut. Selanjutnya, seorang lagi rakan kongsi Lee & Lim, Hasniza kononnya telah menjadi saksi bagi pelaksanaan perjanjian tersebut. Plaintif-plaintif berhujah bahawa pembantu undang-undang lain iaitu Tang Keen Cheong yang bertanggungjawab mengendalikan kes ini dan bukan plaintif keempat atau Hasniza, oleh itu, firma guaman Lee & Lim boleh terus bertindak bagi pihak plaintif-plaintif.

Diputuskan, membenarkan permohonan:

(1) Hujahan pihak plaintif-plaintif bahawa memandangkan plaintif keempat dan Hasniza, yang menjadi saksi material tidak akan mengendalikan perbicaraan, firma Lee & Lim masih boleh bertindak adalah tidak bermerit. Hanya sebuah firma yang boleh dikekalkan sebagai peguamcara dalam rekod dan bukan seseorang peguam. Selanjutnya, kedekatan dan hubungan rakan kongsi dan pembantu undang-undang di firma yang sama terlalu rapat untuk memastikan bahawa konflik kepentingan tidak akan timbul (lihat perenggan 14–15).

(2) Dalam semua kes di mana seseorang peguam menjadi saksi atau dinyatakan tidak layak bertindak, keseluruhan firma tidak layak untuk bertindak. 'Bar Council Rulings 6.04' yang diandalkan oleh pihak plaintif-plaintif tidak mempunyai kekuatan undang-undang dan tidak dapat mengatasi peruntukan undang-undang dan autoriti kes yang dengan jelas menyatakan bahawa apabila seseorang anggota firma guaman menjadi saksi atau mempunyai kepentingan kewangan dalam

perkara tuntutan, firma tersebut tidak boleh bertindak. Berdasarkan dapatan-dapatan di atas, mahkamah berpendapat bahawa demi kepentingan keadilan firma guaman Lee & Lim tidak layak bertindak bagi pihak plaintif-plaintif kerana plaintif keempat dan Hasniza akan menjadi saksi dalam perbicaraan dan mereka juga satu-satunya rakan kongsi di dalam firma guaman tersebut. Tambahan pula, plaintif keempat mempunyai kepentingan kewangan dalam tindakan tersebut (lihat perenggan 16–18).]

Cases referred to

Lee Kam Sun v Ho Sau Lin & Anor [1999] 4 MLJ 509, HC (refd)
Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh [2009] 4 MLJ 293, CA (refd)
Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak [1997] 5 MLJ 705, HC (refd)
Tanjong Marina Management Sdn Bhd v Penang Port Sdn Bhd [2014] 10 MLJ 120, HC (refd)
Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 3 MLJ 679, SC (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 4, 5, 27(a), 28(a)

Andrew Ewe Choon Ming (Ewe Chong & Khoo) for the first and second plaintiffs.
Tang Keen Cheong (Lee & Lim) for the third, fourth and fifth plaintiffs.
Voon Tiam Yu (Chin Tee Shan with him) (Justin Voon Chooi & Wing) for the defendant.

Wong Chee Lin J:

[1] This is an application by the defendants for an order disqualifying the legal firm of Lee & Lim from acting for the first to fifth plaintiffs. I have allowed the application. The third to fifth plaintiffs have appealed against my decision. These are the full reasons for my decision.

BACKGROUND FACTS

[2] The plaintiffs entered into a sale and purchase agreement dated 24 February 2016 with the defendant in respect of a piece of land known as Geran Mukim 102, Lot 343, Tempat Sungai Gadih, Mukim Kerling, Daerah Hulu Selangor ('land 1') for a purported price of RM1.5m.

[3] The plaintiffs were the purported purchasers and the defendant was the purported vendor.

[4] The plaintiffs alleged that the defendant had breached the terms of the sale and purchase agreement which was terminated. The plaintiffs are claiming the sum of RM3m as liquidated ascertained damages from the defendant.

[5] The defendant in his defence and counterclaim claimed that the sale and purchase agreement in respect of land 1 was a sham which was meant or intended to be 'security' only and not for the purposes of any actual sale and purchase. The defendant and two other parties in the counterclaim counterclaimed that four other sale and purchase agreements are also similarly sham agreements and sought for all those agreements to be declared null and void.

[6] One of the purchasers and the fourth plaintiff is Mr Lim Kien Huat. He is the main partner of the legal firm of Lee & Lim which acted for the plaintiffs. It is alleged that the sham sale and purchase agreements were drafted and prepared based on his instructions.

[7] The defendant has applied for the disqualification of the legal firm of Lee & Lim from acting for the plaintiffs. They do so on the basis that Lim Kien Huat has a pecuniary interest in the action and is a partner of Lee & Lim. Furthermore, another partner of Lee & Lim, Hasniza purported to have witnessed the execution of the sale and purchase agreements. This fact is disputed as is the fact whether she had ever explained the real effect of the sale and purchase agreements to the defendant. The plaintiffs do not dispute that the two partners of Lee & Lim are potential material witnesses in the action if it proceeds to trial. They merely say that another legal assistant Tang Keen Cheong is handling the case and not Mr Lim or Hasniza so the firm of Lee & Lim can continue to act.

FINDINGS OF THE COURT

[8] Rules 3, 4, 5, 27(a) and/or 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 provides that:

> 3 Advocate and solicitor not to accept brief if embarrassed
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> (a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed;
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> (b) An embarrassment arises:
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> (i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;
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> (ii) where there is some personal relationship between him and a party or a witness in the proceedings.
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> 4 No advocate and solicitor to accept brief if professional conduct likely to be impugned

A No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

5 No advocate and solicitor to accept brief if difficult to maintain professional independence

B (a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

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27 Advocate and solicitor not to appear where pecuniarily interested

C (a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.

...

28 Advocate and solicitor not to appear in a case where he is a witness

D (a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, ...

[9] In *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509, the court E allowed the preliminary objection that the firm of Cheah Teh & Su should be disqualified from acting for the plaintiff in the civil action as they were the solicitors for the plaintiff in drawing up of the agreement and were involved in the transaction. James Foong J (as he then was) held at pp 513–514:

F It is a well-established principle that lawyers should not act as counsel and witnesses in the same proceedings. The reason, as expounded by Beaumont CJ in *Emperor v Dadu Ramu* AIR 1939 Bom 150, is: 'An advocate cannot cross-examine himself, nor can be usefully address the court as to the credibility of his own testimony, and a court may feel that justice will not be done if the advocate continues to appear'. This rule is expressly accepted by the Federal Court in *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679 at p 678.

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Finally, on the question of jurisdiction, which I was initially rather concerned with, I am aided by the authorities of *Wong Sin Chong*, *Public Prosecutor v Vengadasalam & Ors* [1990] 1 MLJ 507 at p 511 and *Syarikat Pengangkutan* to say that I possess H an inherent jurisdiction to order CTS from acting for the plaintiff in this suit.

[10] *Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705, the court allowed the preliminary objection that the law firm of Messrs Gana Muthusamy & Co should not appear as the solicitors I would be called as a witness. The court held (at p 725):

In my judgment, when Mr Gana Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing, he became a witness on these material and disputed questions of facts. By virtue of r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr Gana Muthusamy should be barred from representing

the plaintiff, be it in open court or in chambers. There are no concessions to be offered. The rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this august profession. The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by and advocate and solicitor of his own choice is not absolute. It is the court that will determine that right ...

Applying that passage to the present case, as a fused profession, Mr Gana Muthusamy cannot be a witness for the defendant and counsel for the plaintiff. That would be wrong and contrary to r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

[11] *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679, at pp 686–687, the Supreme Court held:

In *PP v Vengadasalam & Ors*, Lim Beng Choon J held that the onus of proof was on the prosecution to provide the court with some material that the counsel representing the accused was a material witness for the prosecution before the accused could be deprived of the services of the counsel of his choice. In the course of his judgment, Lim Beng Choon J cited the following statement of Beaumont CJ in *Emperor v Oadu Ramu*:

> The question whether the court has jurisdiction to forbid an advocate to appear in a particular case involves the consideration of conflicting principles. On the one hand, an accused person is entitled to select the advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice merely by serving a subpoena on the advocate to appear as a witness. On the other hand, the court is bound to see that the due administration of justice is not in any way embarrassed. Generally, if an advocate is called as a witness by the other side, it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate, or whether by so doing he will embarrass the court or the client. If a court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate, who has been called as a witness by the other side, and if, notwithstanding the court's expression of its opinion, the advocate refuses to withdraw, in my opinion in such a case the court has inherent jurisdiction to require the advocate to withdraw. An advocate cannot cross-examine himself, nor can he usefully address the court as to the credibility of his own testimony, and a court may well feel that justice will not be done if the advocate continues to appear. But, in my opinion, the prosecution in such a case must establish to the satisfaction of the court that the trial will be materially embarrassed, if the advocate continues to appear for the defence.
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> We would with respect adopt the above statement of the law which, in our opinion, applies to both criminal and civil cases with equal force.

[12] In *Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh* [2009] 4 MLJ 293, the court allowed the application to disqualify the law firm from acting for

A the defendant since the two solicitors of the law firm were involved in the meeting with the parties and likely to be called as witnesses during the trial. The Court of Appeal held at p 300:

> [12] As gauged from the above provision, in the first part of the rule where an advocate and solicitor (especially yet to appear in a case) has reason to believe that he will be a witness in respect of a material and disputed question of fact, he shall not appear in open court or even in chambers. In the second part of it, if he already has made an appearance in a case, and it becomes apparent that he will be a witness of a material and disputed question of fact, he shall not continue to appear if he can retire without jeopardising his client's interests.
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> At first blush, this provision leaves it to the good sense of the solicitor to decide whether he will be called as a witness, in respect of a material and disputed question of fact and refrain from representing a client. Despite that statement we are of the view that a judge pursuant to his inherent jurisdiction has the power to disqualify him if all the statutory preconditions have been complied with (*Public Prosecutor v Vengadasalam & Ors* [1990] 1 MLJ 507; [1990] 1 CLJ 810). Surely to avoid unnecessary problems prevention is better than cure in that, in such a scenario, an advocate and solicitor must be restrained at the outset.

[13] In the case of *Tanjong Marina Management Sdn Bhd v Penang Port Sdn Bhd* [2014] 10 MLJ 120 the court held, inter alia, as follows:

> [6] In so far as all the Rules cited above except for r 7(b), if BH Lawrence were to appear personally for the Plaintiff herein when he himself is an executive director of the plaintiff and is directly involved in the whole dispute of the parties in this case, the elements ofthe direct conflict of interest and the probable embarrassment, the inability to maintain the professional conduct, professional independence on account of his personal and direct pecuniary interest in the case as well as the probability that he may be the material witness for the plaintiff being its executive director and person who had sworn all the affidavits filed for the plaintiff in relation to the above cited Rules in LPR are abundantly clear to this court that BH Lawrence can undoubtedly be unable to act and perform the duties and functions of an advocate and solicitor professionally with his personal pecuniary interest being directly involved. The impartiality in the pursuit of the course of justice and the duty to the court may be compromised as it is human nature that one will not be loathed to abate one's personal interest particularly pecuniary interest in the conduct of the case where his personal and/or pecuniary interest is at stake.
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> [12] From the decision of the Federal Court above, it is amply clear that once an advocate and solicitor has the personal and pecuniary interest, he or she and the legal firm as well as the legal assistants in the same firm should not be permitted to represent those persons in the suits concerned. The same principle ought to apply in the instant case where the personal and pecuniary interest of the advocate and solicitor, BH Lawrence, which is not disputed, is sufficient ground pursuant to r 27(a) LPR to disqualify and/or debar not only himself but his legal firm, partners

and legal assistants from representing the plaintiff company where BH Lawrence is undisputedly the executive director and substantial shareholder.

[14] The plaintiffs' submission that since Mr Lim and Hasniza, who are the material witnesses will not be conducting the trial, the firm of Lee & Lim can still act is without merit. Only a firm can be retained as solicitors on record and not a particular lawyer.

[15] Furthermore, the proximity and relationship of partners and legal assistants in the same firm is too close for comfort to ensure that a conflict of interest will not arise. As an employee and a legal assistant to Lim Kien Huat and/or Hasniza, the said Tan Keen Cheong would be obliged to report to Lim Kien Huat and/or Hasniza on the status of the case where having been briefed of the same, Lim Kien Huat and/or Hasniza by virtue of their retainer must then advise the plaintiffs. The position would also be the same if other legal assistants from the law firm of Messrs Lee & Lim were allowed to represent the plaintiffs in the present case be it in chambers or in open court:

(a) *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509 p 514, the court held:

> On the proposition put forth by both Ms Koe and Mr Su that they were not the solicitors involved in the conveyancing of the property and for this they should be allowed to act for the plaintiff here, I am afraid that they have not considered the fact that it is not they who were retained by the plaintiff in this suit. The firm of CTS was the retainer and as duly considered by Abdul Malik Ishak J in *Syarikat Pengangkutan*'s case, the proximity and relationship of partners and legal assistants in the same firm is too close for comfort to ensure that a conflict of interest will not be practised. As a reminder, it is ingrained in our legal system that: Justice must not only be done but must also be seen to be done, and for this, without casting any aspersion to the integrity of both Ms Koe and Mr Su, I am not convinced by the argument advanced on this point.

(b) *Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705 p 725–726, held:

> Must Mr R Paramanandan and all the legal assistants of Messrs Gana Muthusamy & Co be barred from acting and appearing for the plaintiff in the present case, be it in chambers or in open court? Now, if Mr R Paramanandan were permitted to represent the plaintiff, be it in chambers or in open court, Mr Gana Muthusamy would find himself breaching that concept of absolute obligation not to disclose confidential information which has come to his knowledge as counsel for the plaintiff because that confidential information will be relayed to Mr R Paramanandan. As an employee and a legal assistant to Mr Gana Muthusamy, Mr R Paramanandan would be obliged to report to Mr Gana Muthusamy the daily progress of the case. Having been briefed of the daily progress of the case, Mr Gana Muthusamy by virtue of his retainer

must then advised the plaintiff. The position would also be the same if other legal assistants from the law firm of Messrs Gana Muthusamy & Co were allowed to represent the plaintiff in the present case be it in chambers or in open court. It is a vicious circle. To say that Mr Gana Muthusamy would not be involved in the case at all is wrong. No doubt Mr Gana Muthusamy would not appear in chambers and in open court for this case but indirectly he would be involved. How could Mr Gana Muthusamy conduct himself with decorum and avoid a conflict of interest situation if Mr R Paramanandan is allowed to represent the plaintiff in the present case, be it in chambers or in open court? For fear of repetition, since Mr Gana Muthusamy owns the law firm of Messrs Gana Muthusamy & Co, that law firm should not appear on record as solicitors for the plaintiff. I am constrained to mechanically apply not only the Legal Profession Act 1976 but also the Legal Profession (Practice and Etiquette) Rules 1978 to the facts of the present case.

[16] In all the cases wherein certain lawyers are witnesses or are otherwise disqualified from acting, the whole firm has been disqualified from acting. The plaintiffs rely on Bar Council Rulings 6.04 which provides that: 'A law firm may act for one of its partners, consultants or legal assistants in respect of a personal claim by or against that partner, consultant or legal assistant'.

[17] However, this does not have the force of law and cannot override statutory provisions and case authorities. These clearly state that where certain members of a firm are witnesses or have a pecuniary interest in the subject matter of the claim, the firm should not act.

[18] In the premises, I am of the view that it would be in the interest of justice for the firm of Lee & Lim to be disqualified from acting for the plaintiffs as Mr Lim and Hasniza will be witnesses in the trial and Mr Lim furthermore has a pecuniary interest in the action and they are the only partners of the firm of Lee & Lim.

Application allowed.

Reported by Dzulqarnain bin Ab Fatar